ASIA INSURANCE CO., LTD. v. AMERICAN INTERNATIONAL ASSURANCE CO., LTD.

[O. C. J. (Brown, J.) April 8, 1953]

[Singapore — Suit No. 535 of 1951]

Insurance — Insurance of stocks of rubber — Insured knowingly storing rubber without a licence — Material misdescription of facts — Reinsurance — Liability of Insurers.

In this case the plaintiffs claimed the sum of $60,131.60 on a policy of reinsurance of stocks of rubber. The rubber which belonged to the Bian Hoe Co. was destroyed in a fire. The plaintiff company had insured by fire policies of insurance the stocks of rubber for a total sum of $410,000 and had reinsured with the defendant company their liability under their fire policies for $97,500. The plaintiff company paid Bian Hoe Co. the sum of $245,000 out of their total liability of $410,000 and claimed the due proportion of their liability from the defendants. The defendants resisted the claim of the plaintiffs on a number of grounds, viz. (i) that the plaintiffs were under no liability to their insured as their insured had no licence under section 211 of the Municipal Ordinance or under section 3 of the Rubber Dealers Ordinance; (ii) that there was a material misdescription of facts which it was material for them to know for the purpose of estimating the risk; (iii) that the property insured had been moved to a building or place other than that in which it was stated in the policy to be; (iv) that the insured had failed to comply with Condition 11 of the policies which required the insured to produce to the insurers all documents touching the liability or the amount of liability of the insurers as might be reasonably required; (v) that the insured had failed to comply with Clause 13 of the policies which required action to be taken within 3 months of the rejection of the claim by the insurers; (vi) that the plaintiff company had paid Bian Hoe Co. without liability on their part and without the consent of the defendants.

Held: (1) as the Bian Hoe Co. had no licence for the storage of the rubber and as the Company knew that they were committing an illegality in storing rubber without a licence, the defendants were not liable under their policies of insurance; (2) there was in fact a material description of facts in the description of the place of storage of the rubber and that this invalidated the policy of reinsurance; (3) on the facts the rubber insured had been moved to places of greater risk and that the insurers were therefore entitled to repudiate; (4) the Bian Hoe Co. had failed to produce documents as would show with reasonable accuracy the quality and value of the rubber destroyed and that they had therefore failed to comply with a condition of their policy; (5) the insured had failed to comply with Clause 13 of the policy in that action was only commenced six months after the rejection of the claim and therefore the action must fail on this ground; (6) the plaintiff company had paid Bian Hoe Co. without the consent of the defendants and contrary to their instructions and therefore the defendants were not liable to reimburse them.

Cases referred to :—

(1) *Goulstone v. Royal Insurance Co.* 175 E.R. 725.

(2) *Johnson v. Hudson* 103 E.R. 973.

(3) *Chen Chi Wei v. Khoh Keng Chong* (1951) M.L.J. 204; (1951), 2 M.L.R. 162.

(4) *Haseldine v. Hosken* (1933) 1 K.B. 822.

(5) *Burrows v. Rhodes* (1899) 1 Q.B. 816.

(6) *Tinline v. White Cross Insurance Assn.* (1921) 3 K.B. 327.

(7) *James v. British General Insurance Co.* (1927) 2 K.B. 311.

(8) *Toulmin v. Anderson* (1808) 1 Taun. 227; 127 E.R. 820.

(9) *Bates v. Howitt* L.R. 2 Q.B. 595.

(10) *Home Insurance Co. of New York v. Victoria-Montreal Fire Insurance Co.* (1907) A.C. 59.

(11) *Chippendale v. Holt* (1895) 1 Com. Cas. 197.

(12) *British Dominions General Insurance Co. v. Duder* (1915) 2 K.B. 394.

CIVIL ACTION.

C. H. Smith and *L. A. J. Smith* for the plaintiffs.

Dr. C. H. Withers-Payne for the defendants.

Cur. Adv. Vult.

Brown, J. : — On the 27th of July 1950 a serious fire broke out at the Aik Hoe Rubber Factory in Kim Chuan Road, of which a plan appears at Appendix B of the Assessor's Report (Ex. H). Situate within the compound comprising the Aik Hoe Rubber Factory was a building (marked H on the plan) belonging to the Bian Hoe Company, which contained 16 smoke-houses.

By four policies of insurance the plaintiff company had insured the Bian Hoe Company's stocks of rubber "whilst contained in the 16 smoke-houses" for a total sum of $210,000. By a fifth policy of insurance the plaintiff company had insured Bian Hoe's rubber "whilst lying in the open 25 feet away from the Insured's smoke-houses" for $200,000. By four policies of reinsurance (Ex. D, E, F and G) the plaintiff company had reinsured with the defendant company their liability under their fire policies for $97,500.

The Assessors' Report having given rise to doubts whether the plaintiff company was liable under their policies with Bian Hoe, by letters dated 8th and 15th August and 11th and 27th October 1950 the defendant company warned the plaintiff company against making any admission of their liability to the Bian Hoe Company. By two cheques dated 9th November 1950 the plaintiff company paid to the Bian Hoe Company the sum of $245,000 out of their total liability of $410,000. And by letter dated 17th January 1951 the defendant company finally repudiated all liability under their contracts of reinsurance.

The plaintiffs now claim from the defendants the sum of $60,131.60 as being the due proportion of

their total liability under the contracts of re-insurance; and this claim is resisted upon seven grounds.

The first ground is that the plaintiffs were under no liability to their Insured (the Bian Hoe Company) because their Insured had no licence under section 211 of the Municipal Ordinance or under section 3 of the Rubber Dealers Ordinance, and that in operating their smoke-houses at Kim Chuan Road they were committing an illegal and criminal act. Section 211(*p*) of the Municipal Ordinance prohibits unlicensed premises from being used for the "treatment or smoking" of rubber. Only a small part of this rubber was in the smoke-houses being treated at the time of the fire; and if the absence of a licence under the Municipal Ordinance were to invalidate the policies so far as that small amount of rubber was concerned, its value could be deducted for the amount claimed. But section 3 of the Rubber Dealers Ordinance prohibits the *storage* of rubber without a licence. All the rubber which is the subject of these policies was being stored upon these premises without a licence, so that if this ground of defence succeeds it must invalidate the policies in their entirety.

By section 4(1) of the Rubber Dealers Ordinance the licence is to be "in such form as may be prescribed." The prescribed form provides a space for the licensing officer to describe the place or places where the rubber may be stored. The licence is in fact a licence to purchase; and section 4(1) of the Ordinance says that a licence to purchase includes the right to keep a place or places for storage. On behalf of the plaintiffs it was argued that the Governor in Council, in prescribing a form which places upon the licensing Authority the duty of determining where the rubber may be stored, has acted *ultra vires* the Ordinance; firstly because it deprives the holder of a licence to purchase rubber of a right to keep a place for storage which section 4(1) gives him; secondly because section 8 limits the power of the Licensing Authority to granting, renewing, or revoking a licence and does not include the power to say where the rubber shall be stored. But section 3 says that "no person shall purchase, treat or store rubber unless he shall have been duly licensed in that behalf by the licensing officer." And by section 4(1) the licence is to be in the prescribed form. It seems to me that the form is clearly one which it is within the powers of the Governor in Council to prescribe under section 18 in order both to secure "the effectual control of storage" and to "carry into effect" the provisions of section 3 of the Ordinance.

But the plaintiffs' main contention on this part of the case is that the fact that Bian Hoe Company had no licence did not invalidate their policies with the plaintiffs; and a number of authorities were cited to shew that the fact that an illegal act had been committed in relation to property which was the subject of a contract had not invalidated the contract. In *Goulstone v. Royal Insurance Co.*[1] an insolvent had fraudulently concealed goods from his creditors and insured them, but it was held that he had an insurable interest in the goods and that his illegal act did not invalidate the policy of insurance. In *Johnson v. Hudson*[2] it was held that a factor who sold tobacco without being licensed as a dealer in tobacco could maintain an action against the purchaser for the value of the tobacco sold and delivered to him. And in the local case of *Chen Chi Wei v. Khoh Keng Chong*[3], where a landlord had let a tenant into occupation of premises upon the condition that the defenant would effect certain repairs before the tenancy came into operation, it was held that although it was an offence under section 2 of the Premiums on Leases Ordinance (Cap. 120) for the landlord to make this condition without the authority of the Municipal Commissioners it did not invalidate the tenancy agreement.

Now it seems to me that the reason for the decision in all these cases was that the illegality which was committed by one of the contracting parties did not affect the bargain which the parties had made. In each case the contracting parties knew what they were bargaining for, and got it. The risk which the insurer took in insuring the goods of the insured who had fraudulently concealed them from his creditors was not increased by the fact of the insured's fraudulent concealment. The value of the tobacco was not diminished by the fact that the seller had no dealer's licence. The tenant, who made his bargain to put the premises in repair before his tenancy commenced, obtained all that he had bargained for, and the fact that the landlord committed an illegality in failing to set out this condition in a written document for presentation to the Municipal Commissioners did not affect the bargain. Did Bian Hoe's failure to obtain a licence affect the bargain either between themselves as insured and the plaintiffs as insurers or between the plaintiffs as the reinsured and the defendants as the reinsurers?

It is clear from the evidence of Mr. Cordeiro that one of the purposes for which a licence is required is as a precaution against the dangers of fire. He has described the procedure which is employed when an application for a licence is made. The application is

first sent to the Superintendent of the Fire Brigade for his comments. The Superintendent's comments are then forwarded to the applicant, and as soon as the applicant has complied with the requirements of the Fire Brigade he informs the Licensing Authority in writing. His letter is then sent to the Fire Brigade. And if the Superintendent is satisfied a licence is issued. From the 1st of March to the 31st December 1949 Bian Hoe Company's premises at 394 Kim Chuan Road were licensed (Ex. A). For the year 1950 they were not (Ex. B). The reason why they were not was that as Bian Hoe's building at H. on the Plan was within Aik Hoe's compound, Aik Hoe applied for a licence for the whole of their compound; and conditions in Aik Hoe's compound were such that no licence could be granted. Certain correspondence between Aik Hoe & Co. and the Licensing Authority relating to Aik Hoe's attempts to obtain a licence for the year 1950, beginning with a letter dated 23rd December 1949 and ending with a letter dated 10th July 1950, is in evidence. This correspondence shews very clearly why no licence could be obtained. In para. 2 of the letter 10th July 1950 Aik Hoe was given this warning:—

"You are warned that if these conditions are allowed to persist it is almost certain to be a complete burn-out should a fire occur in your factory."

In para. 2 of the letter from the Licensing Authority dated 20th May 1950 Messrs. Aik Hoe & Co. were informed that their licence could not be renewed for the year 1950 "and that a prosecution will be initiated if conditions in the factory are not improved by 30th June 1950." Mr. Smith, on behalf of the plaintiffs, has argued that this letter shews that the Licensing Authority was permitting the business to be carried on and were allowing Messrs. Aik Hoe & Co. time to remedy the defects; and (he says) "that is half way to granting a licence." Whatever leniency or indulgence on the part of the Licensing Authority that letter may shew, I cannot see that it takes any step at all in the direction of granting a licence. The evidence in this case shews (a) that the Aik Hoe factory was not licensed, (b) that the Bian Hoe building, which was within the Aik Hoe factory was not licensed, and (c) that the refusal to grant a licence was due to the dangerous conditions existing on the premises of which the correspondence to which I have referred bears ample testimony.

It is in the light of that evidence, and in the circumstances which the correspondence reveals, that I ask myself whether the fact that Bian Hoe Co. had no licence affected these contracts of insurance and reinsurance, or not? Were all parties getting what they bargained for, or were they not? Was the risk which the plaintiff company undertook, or which the defendant company undertook when they reinsured it, increased by the fact that the Bian Hoe Co. was operating without a licence, or was it not? It seems to me that the conditions which precluded the Bian Hoe Co. from obtaining a licence were such that their illegal act in operating without a licence goes to the root of these contracts of insurance and reinsurance. The defendants accepted the usual rates because they thought that they were reinsuring a normal fire risk, in which the dangers of fire had been reduced by the usual precautions which are required before a licence will be granted. In fact they were re-insuring no such thing.

I therefore hold that the defendants are entitled to succeed upon the ground of Bian Hoe's illegality. The parties were not *ad idem*. If the plaintiffs did not know that Bian Hoe had no licence they were not *ad idem* with Bian Hoe, because they were insuring a risk which was greater than they knew, and they could have repudiated their liability under their contracts of insurance upon that ground. If the plaintiffs did know of Bian Hoe's illegality, they did not disclose this knowledge to the defendants; and the defendants were not *ad idem* with the plaintiffs when they entered into the contracts of reinsurance.

But I think there is a further reason why the defendants are entitled to succeed on this ground of illegality. A comparison of Exhibits A and B shows that in the year 1949 the Bian Hoe Co. had a licence to store rubber at their premises in Beach Road, and after the 1st of March — by an endorsement on the licence which was made on the application of Bian Hoe, whose representative went to the Land Office to obtain it — at their premises in the Aik Hoe factory at 394 Kim Chuan Road. In 1950 their licence to store rubber at Beach Road was renewed, but not for 394 Kim Chuan Road. These two Exhibits seem to shew (a) that in 1950 they knew that they were operating the factory in Kim Chuan Road without a licence; (b) that in so doing they knew that they were committing an illegality. If only the first is established it is sufficient to bring the case within the principle of *Haseldine v. Hosken*[4]. In that case a solicitor who had taken out an indemnity policy which insured him against loss arising by reason of any neglect, omission, or error while acting in a professional capacity, entered into a champertous agreement. It was established that he knew that he was making a contract to provide the costs to carry on an action without being able to claim them from his client, on the terms that he should get a percentage of the amount recovered and should have

power to prevent a settlement of the action. It was not established that he knew that in making such a contract he was committing a criminal offence. The principle for which that case is an authority is that which was accepted in the earlier cases of *Burrors v. Rhodes*[5], *Tinline v. White Cross Insurance Association*[6] and *James v. British General Insurance Co.*[7] namely, that when a man intentionally does an act which, though he does not know it, is in fact criminal he cannot claim to be indemnified in respect of it. But in the present case it seems to me that the Bian Hoe Co. must have known that in operating their premises at Kim Chuan Road without a licence they were committing an act which was criminal. Despite the fact that on 1st March 1949 Bian Hoe had sent their own man to obtain the licence, Mr. Tan Boon Chong, the owner of Bian Hoe, insisted that he left the matter of his licence to Aik Hoe. If so, then Aik Hoe were the agents of Bian Hoe in regard to this matter; and in the light of the correspondence it cannot be suggested that Aik Hoe did not know of the legal necessity for obtaining a licence. It seems to me that not only does the principle laid down in *Haseldine v. Hosken*[4] apply in this case; it applies with greater force. *"Ex turpi causa actio non oritur."* This action arises out of loss caused by a fire, to which the dangerous conditions which had precluded a licence being granted contributed. Notwithstanding the dangerous conditions, Bian Hoe continued to store their rubber without a licence, which they knew at the time was illegal. Whether the plaintiffs were aware, before the fire, of Bian Hoe's illegality or not, they were free from liability under their policies. *Toulmin v. Anderson*[8]. They now claim to be indemnified by the defendants in respect of a payment which they were not liable to make.

Before passing on from this part of the case it may be useful to contrast the position of an insured who, through negligence or inadvertence, fails to renew his licence upon the expiry date; and a fire breaks out a month later. There would be no *"turpis causa,"* because the omission is inadvertent and not wilful. And I cannot think that a defence would be open to the insurers based on the other constructual principle which I have discussed, because the absence of a licence would not be due to the fact that the Licensing Authority had refused to renew the licence on account of the unsafe condition of the premises, but merely to the fact that the insured had forgotten to apply for its renewal. The case would thus fall, in my opinion, within the category of *Goulstone v. Royal Insurance Co.*[1]. The bargain which the parties had made would not be affected. The risk which materialised when the fire broke out would be the same risk as the insurer had undertaken by his contract of insurance.

By their second ground of defence the defendants rely upon Condition 1 of the policies and say that there was a material misdescription of facts which it was material for them to know for the purpose of estimating the risk. This misdescription is alleged to fall under two main heads. (a) It is said that the defendants were made to believe that the rubber was contained in 16 smoke-houses which were outside the Aik Hoe compound and about half a mile away from it, whereas in fact they were situate in the centre of the compound with Aik Hoe's buildings all round them. (b) In policy H.F. 12303 the rubber insured was to be 25 feet away from the insured's smoke-houses, whereas it was in fact contiguous to the building in which the smoke-houses were.

The material words of the policies are :—

> "Whilst contained in the 16 smoke-houses constructed of brick and roofed with tiles..... 2nd Block Smoke houses from Messrs. Aik Hoe Rubber Factory."

It is difficult to understand how, from that description, the defendants could be expected to know that the building H, was inside the Aik Hoe compound — a fact which, for reasons which Mr. S. H. Peek has stated in evidence, it was vital to know. It seems to me that the documents speak for themselves. But these reinsurances were arranged verbally over the telephone, which I understand is the normal practice. Mr. Peek's evidence of the telephone conversation is that Mr. Tan Teow Quee started by saying : "I want to offer you a reinsurance, and here are the particulars." He then referred to Bian Hoe's 16 smoke-houses and offered a 25% reinsurance. Mr. Peek then asked him where they were; and Mr. Tan replied that they were about half a mile from Aik Hoe Factory in Kim Chuan Road. Mr. Tan's version of what he said (as opposed to what he meant) is contradictory. He said that he read out to Mr. Peek the description from the Proposal Form which was in front of him. The Proposal Form would have thrown much light on this matter, but it has not been produced. Mr. Tan agreed at first that he told Mr. Peek that the smoke-houses were about a quarter of a mile from Aik Hoe Factory. He said that what he meant by that was that the Bian Hoe building was inside the compound and a quarter of a mile from the entrance. He said that he personally did not know until after the fire whether Bian Hoe's building was inside or outside the compound, but that he had been told by his Managing Director, Mr. Lee

Leong Kee, that it was inside and that was the information which he had when he telephoned to Mr. Peek. He then altered his original answer and said that he told Mr. Peek that Bian Hoe's building was inside the compound. Having heard the evidence in this case I have no doubt that nothing was said about the building being either "inside" or "outside" the compound, and that Mr. Peek was merely told that the 16 smoke-houses were about half a mile from the Aik Hoe factory. I also can have no doubt that neither from the documents nor from what he was told on the telephone could Mr. Peek have known that the smoke-houses were inside the Aik Hoe compound.

This was a fact which it was vital for Mr. Peek to know, because the defendants had already insured Aik Hoe's rubber inside the compound "up to their limit." The significance of this expression is that the defendants' interest in the rubber which was inside the compound had reached a figure which they would not have increased except by re-insuring themselves in respect of such increase, and in order to do this Mr. Peek would have had to consult his Head Office in Hong Kong. He would not have been prepared to do this for only a 25% reinsurance of a comparatively small quantity of rubber; and if he had known that Bian Hoe's smoke-houses were inside the compound he would have refused the reinsurance.

In regard to policy H.F. 12303 the rubber which was covered by that policy was "whilst lying in the open 25 feet away from the Insured's smoke-houses," and for this a special low rate of 25 cents was charged. It is conceded that if the rubber was within 25 feet of the building this low rate would not apply, and it is clear from the Assessors' Report that the rubber was in fact within 25 feet of the building. I should have thought that there could be no question of liability in respect of this rubber, if it were not for a puzzling passage in Mr. Watson's evidence (which was taken '*de bene esse*') in which he says: "I am satisfied 25 feet away is the same as within 25 feet: that is normal phraseology." Mr. Watson was not available to explain this passage. But I do not think that "25 feet away" can mean anything except a distance of not less than 25 feet from the smoke-houses; and this rubber was contiguous to the building in which the smoke-houses were; as shewn in the shaded portion of the sketch plan at Appendix C of Exhibit H.

Upon the evidence in this case it seems to me that the following matters, in support of the defendants' case of misdescription have been established:—

(a) The rubber was not in the "Second Block of Smoke-houses from Messrs. Aik Hoe Rubber Factory". As Mr. Watson puts it in his Report, this suggests an "isolated" risk. It suggests that they were outside the factory and two blocks away from it. The rubber was in fact in the middle of the Aik Hoe Rubber Factory.

(b) Only a small portion of the rubber was "contained in the 16 smoke-houses constructed of brick and roofed with tiles". Appendix C of Ex. H shews the location of the rubber which was outside the 16 smoke-houses, but in the same building in what has been called the Store. The 16 smoke-houses were made of brick walls and tiled roofs. The Store was not.

(c) The rubber in the open was not "25 feet away from the Insured's smoke-houses". It was within 25 feet and contiguous to a wall of the Store which was made of corrugated iron and wire.

Now if the matter ended there I think the law is clear that these matters of misdescription must invalidate the policies to which they relate. But the plaintiffs assert that Mr. Peek knew the true position because he had visited the premises some three days previously. If this is established I think that *Bates v. Hewitt*[9] would be authority for saying that this ground of defence must fail. That was a case of marine insurance; but I cannot doubt that the same principle would apply to all insurance policies, namely that where a particular fact is known to the insurer at the time he cannot afterwards set up as a defence that the fact was not communicated to him by the insured. In seeking to establish the fact that Mr. Peek did know, the plaintiffs place considerable reliance on a letter which he wrote to the plaintiffs' Managing Director on 16th October 1950. It relates exclusively to Bian Hoe's claim. It is headed "without prejudice," which would seem to shew the importance which Mr. Peek attached to it. And in para. 2 the following words appear:—

"When the writer inspected the risk on the Monday before the fire, the Store was packed full with rubber."

It is necessary to consider in full Mr. Peek's evidence upon this matter. As I have already stated, the defendants' interest in Aik Hoe's rubber was heavy, and they had in fact reached their limit. The defendants and the New Zealand Insurance Co. had between them insured Aik Hoe's rubber in the drying shed marked A for $1,250,000; their rubber in the building marked C for the same amount; and the rubber in the building B, D, E, F, and G, and that which was lying in the open, for $4,500,000. Rubber to the north of building G was not in their risk. A week before the fire Aik Hoe & Co. had pressed the defendant company and the New Zealand Insurance Co. to give 1½ million dollars additional cover; and on the Monday before the fire Mr. Peek and Mr. Lind of the New Zealand Insurance Co. went with Mr. Shaw, the Superintendent of the Fire Brigade, to inspect the compound. They were appalled at the conditions, and Mr. Peek wanted to give Aik Hoe 24 hours notice of

cancellation. Mr. Lind would not agree to this; and one month's notice was given. Their interest ended at building G. They were not concerned — or Mr. Peek thought he was not concerned — with any rubber situate to the north of that building. But while inspecting building G Mr. Peek must have noticed the general conditions in and around building H, which is immediately to the north of G. He had no idea that it was Bian Hoe's building. He thought that it was one of Aik Hoe's buildings in which, being north of G, he was not interested. That is his explanation of the material passage in his letter, and I accept it. Why should Mr. Peek, who had only been restrained by Mr. Lind from giving 24 hours notice of cancellation of his company's very considerable interest in Aik Hoe's rubber, hesitate for a moment in giving 24 hours notice of cancellation of his comparatively small interest in the rubber in that one building of Bian Hoe? Notwithstanding that passage in Mr. Peek's letter of the 16th October 1950, having heard his explanation, the evidence leads me to the conclusion that he had no knowledge of the material facts which are misdescribed in the policies. I hold that this ground of defence must succeed.

By para. 6 of their Defence the defendants refer to Condition 6 of the policies which exempts loss or damage arising from riot, and say that the loss or damage arose out of or in connection with a riot. It is no longer contended that the fire was caused by a riot, and this ground of defence must fail. But it is said that the Assessors' Report should have caused the plaintiffs to make enquiries whether Condition 6 (the Riot clause) of the policies would be applicable; and by the last paragraph of Condition 6 the burden would have been on Bian Hoe Co. to prove that there was no riot. The plaintiffs paid Bian Hoe without making enquiries. This is said to be material to paragraph 12 of the Defence, in which the defendants contend that the plaintiff paid Bian Hoe without having incurred liability, and without the consent and contrary to the instructions of the defendants.

By para. 7 of the Defence the defendants refer to Condition 8 of the policies, whereby no liability arises if (a) the trade or manufacture, or the circumstances affecting the building which contains the insured property, is changed in such a way as to increase the risk; or (c) if the property insured be moved to any building or place other than that in which it is stated in the policy to be. I have already dealt fully with the evidence which is material to this ground of defence. It will be sufficient to say that with regard to (a) the policies insure the rubber "whilst contained in the 16 smoke-houses" and "whilst lying in the open 25 feet away from the Insured's smoke-houses." Some of the rubber destroyed was in fact lying in the Store, which was not made of bricks or roofed with tiles; and some of it was lying outside the building against the wall of the Store which was made of corrugated iron and wire. It seems to me that the risk to rubber which is in the same building as the smoke-houses, but not contained in the smoke-houses, must be a greater risk than the risk to rubber which is contained in bricked tiled smoke-houses. And the risk to the rubber which was lying outside the building up against a wall made of corrugated iron and wire must be a greater risk than the risk to rubber which is 25 feet away from the building with a fire break between. In regard to (c) it seems to me that the risk to rubber contained in 16 smoke-houses outside the Aik Hoe factory and two blocks away is less of a risk than the risk to rubber contained in smoke-houses which are situate in the middle of the Aik Hoe factory, and surrounded by buildings some of which have furnaces in them. I think that the defendants must succeed upon this ground of their defence.

By para. 8 of the Defence the defendants invoke Condition 11 of the policies, which requires that the insured shall produce to the insurers all documents touching the liability or the amount of liability of the insurers as may reasonably be required. Now what is the meaning and purpose of that condition? Insurers are not going to accept a fire risk unless means exist of determining with reasonable accuracy the value of the property which is destroyed by fire which they will be called upon to pay. And the short question here is whether Bian Hoe were able to produce such documents as would shew with reasonable accuracy the quantity and value of the rubber destroyed by which the insurers' liability can be determined. If not, they failed to comply with a condition of their policy, and the insurers were entitled to repudiate. The material evidence is contained in the bottom half of page 10 and on page 11 of the Assessor's Report, and it is summed up on page 14 in the following passage:—

> "The Insured's method of accountancy necessitated considerable waste of time and the fact that his system of keeping the accounts so that no check could be made on the quantities or value of the rubber at any one of his smoke-houses rendered checking of his claim impossible."

Then how can it be said that the insurer complied with either the letter or the spirit of this condition, or that the purpose of it was fulfilled? I hold that the defendants are entitled to succeed on this ground.

By para. 9 of the Defence clause 13 of the policies is invoked whereby "if the claim be made and rejected and an action or suit be not commenced within 3 months after such rejection . . . . all benefit under this policy shall be forfeited." The defendants finally rejected the plaintiffs' claim by their letter dated 17th January 1951. The writ was issued 6 months later.

Of the four policies of reinsurance Ex. E, F, and G state that the policy is "subject to all the conditions of the original policy." Mr. Smith says that some of the conditions of the original policy are not applicable to a policy of reinsurance, and that condition 13 is one of them. In support of this argument he relies upon the case of *Home Insurance Co. of New York v. Victoria-Montreal Fire Insurance Company*[10]. But this argument cannot apply to Ex. D because in that reinsurance policy all the conditions are set out.

In the case which Mr. Smith cited the reinsurance was effected by attaching to the printed form of the original policy a type-written slip containing the special terms of the reinsurance. The original policy was not amended except by inserting the syllable "re" before the word "insure". Thus a form of policy of insurance was converted to a form of policy of reinsurance containing the following clause:—

"No suit or action on the policy for the recovery of any claim shall be sustainable.....unless commenced within twelve months next after the fire.

I stress the last three words. The defendants are not relying on Condition 19 in these policies, and I contrast the words in Condition 13 which is the condition on which they rely: "If the claim be made and rejected and an action or suit be not commenced within three months *after such rejection.*" In the Privy Council case cited the clause in that case was held to have no application to a policy of reinsurance, because an original insurer must wait until such time, *after the fire,* as the original insured makes, or can prove, his claim against him. He is powerless in the matter. But in condition 13 of the policies which are under consideration in the present case, the time limit is not related to the date of the fire; it is related to the date of the *rejection of the claim.* There is no reason why that condition should not be applicable to these policies of reinsurance. When the defendants rejected the plaintiffs' claim on the 17th January 1951 the plaintiffs could have commenced this action at any time. Therefore on this ground of defence I hold that the defendants must succeed.

The final ground of defence is contained in para. 12 of the defendants' pleading. They say that the plaintiff company paid Bian Hoe Co. without liability on their part and without the consent of the defendants and/or contrary to the instructions contained in the defendants' letters dated 8th and 16th of August, 11th or 27th October, and 9th November 1950.

The plaintiffs' case in regard to this allegation is firstly that as original insurers the decision of whether to pay or not rested with them. Mr. Lee Leong Kee, the plaintiffs' Managing Director, went so far as to say that it had nothing to do with the defendants. Secondly, Mr. Lee said that when he made the payment on November 9th he was not aware that the defendants were objecting to the payment being made upon any specific ground other than that if Bian Hoe's claim should be met Aik Hoe's claim would be prejudiced. The first is a matter of law; the second is a matter of fact.

This was a facultative reinsurance; that is to say, the defendants had reinsured the plaintiffs in respect of certain specific policies which the plaintiffs had made; as opposed to a treaty insurance, where the reinsurer gives cover for the liabilities which the reinsured may undertake in respect of his policies over a period. The very argument which the plaintiffs put forward in this case was advanced in *Chippendale v. Holt*[11]. In that case it was urged on behalf of the original insurers that the decision must rest with them and that it was not unreasonable that the reinsurers should trust to the honour and sound judgment of those whose liabilities they had taken upon themselves. In rejecting that argument Mathew, J., made the comment that such a contract would be a wager, not a reinsurance. The case of *British Dominions General Insurance Co. v. Duder*[12], which was cited on behalf of the plaintiffs in the present case, does not appear to me to be in point. That was a case in which an action, which had been brought by the original insured against the original insurers, had been compromised by the insurers paying 66% of the loss. The reinsurers had declined to agree to the compromise. In an action by the insurers against the reinsurers it was established that, if the action had not been compromised, the insurers would have been liable to their insured for 100% loss; and they claimed 100% on their policy of reinsurance. It was held that the contract of reinsurance was a contract of indemnity and that the reinsurers were entitled to the benefit of the compromise even though it had been made without their consent. That decision does not appear to me to detract from the view that a reinsurer is only liable on the policy of reinsurance if the original insurer was legally liable on the policy of insurance. It establishes that, because a contract of reinsurance is a contract of indemnity, a

reinsurer is only liable to indemnify his reinsured for the loss which he has actually incurred as a result of his legal liability; and not for the full amount of his legal liability if he has not had to pay the full amount.

Upon the question of fact I should have thought it was difficult for the plaintiffs to contend that they did not appreciate that the defendants were advising against an admission of liability, in the light of the letters which are referred to in para. 12 of the Defence. Nevertheless, Mr. Lee's son (who was sub-poenaed by the defendants) said that as a result of the several interviews which he had with Mr. Peek he did not know that they were repudiating liability. And when the letter dated the 8th August 1950 was put to him he agreed that in that letter the defendants appeared to be denying liability, but he said that at later interviews he "received a lot of encouragement from them." His father said that he did not know that the defendants were objecting upon the ground of Riot, until long after he had paid Bian Hoe's claim on 9th November. But in para. 2 of the letter dated 16th August Mr. Peek wrote :—

"We have made it clear that in view of the origin of this fire we do not consider that any liability rests on your or our policies (which did not include "Riot Damage")."

The unfortunate impression which Mr. Lee Leong Kee made by an answer which appears to be plainly at variance with the correspondence was not reduced by his denial of any recollection of a meeting which was held at his office on November 2nd. Immediately after this meeting Mr. Peek made a note of it, which is in evidence as Ex. 2. Mr. Lee's son remembers the meeting, and he remembers that one of the points raised was Riot. But although Mr. Lee's son is able to remember that the Riot point was raised he is unable to remember if any other points were raised at that meeting against liability being admitted. Am I then being asked to conclude that Ex. 2, which Mr. Peek made that same evening, was the product of Mr. Peek's imagination? The note says that misdescription; the rubber being within 25 feet; and many other such points were discussed; and it records that Mr. Peek agreed to make a memorandum setting out the various points for consideration. And in Ex. 3 we have the promised Memorandum, with a covering letter dated 9th November (the day on which the plaintiffs made the payment), which explains that the Memorandum "only outlines the basis on which a payment *ex gratia* COULD BE MADE by the plaintiffs *if they consider the client and connexion worth while.*" It concludes with the warning that if any payment is made the Memorandum is not to be taken as any indication that the defendants will make any contribution. Attached to this covering letter is a seven-page Memorandum. Mr. Lee Leong Kee says that he has never seen this Memorandum. His son says that he cannot recall having seen it. Mr. Tan Teow Quee says that he has never seen it, but that he received the letter dated 13th January 1951 in which Mr. Peek asked him to return the Memorandum; and he filed the letter without replying to it. Is it conceivable that Mr. Peek would have taken the trouble to write a seven-page Memorandum unless, at the meeting on November 2nd, he had urged upon the plaintiffs that they were under no liability to pay Bian Hoe, but that finding them anxious to pay "a client and connexion which was worth while," he was endeavouring to shew them how to do so on an *'ex gratia'* basis? I find as a fact that the plaintiffs made this payment without the consent of the defendants and contrary to their instructions.

At this stage I feel bound to refer to the evidence of Mr. Lee Leong Kee at the start of his cross-examination. It appears that the Chairman of the Board of the plaintiff company is Mr. Tan Boon Kak, who is a brother of Mr. Tan Lark Sye who is a Director of Aik Hoe, and that Mr. Tan Boon Kak and Mr. Tan Lark Sye are brothers of Mr. Tan Boon Chong who owns the Bian Hoe Co. I desire to say no more than that it appears to me that this is one of the factors which must be taken into consideration in determining whether the plaintiff company, in their readiness to pay the Bian Hoe Co., did so without the consent and contrary to the instructions of the defendant company; when (as I have held) the plaintiff company could properly have repudiated their liability to the Bian Hoe Co. upon four separate grounds.

There must be judgment for the defendants with costs.

Judgment for the defendants.

REGINA v. LOH AH CHENG.

[Cr. R. J. (Spenser Wilkinson, J.) February 13, 1953]

[Penang — Criminal Revision No. 2 of 1953]

Emergency Regulations 1951, regs. 4c and (12) — Jurisdiction of Sessions Court to try offences under reg. 4c(3) — Limitation of reg. 12 — Difference between "imprisonment of either description" and "penal servitude".

This was a criminal revision of a case in which the accused had been convicted and sentenced to 2 months rigorous imprisonment by a Sessions Court for an offence under reg. 4C(3) of the Emergency Regulations, 1951, which is punishable with penal servitude for life.